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Supreme Court of the United States.

OCTOBER TERM, 1970.

No.

SAMUEL FIORE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinion Below.

The opinion of the court below (App. A) is not yet reported.

Jurisdiction.

The judgment of the court below was entered on December 4, 1970. By order of the court below, dated December 14, 1970, petitioner's motion to stay mandate was allowed pending the filing and disposition of a writ of certiorari in

this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether 18 U.S.C. § 894, exceeds congressional authority granted pursuant to the Commerce Clause and Bankruptcy Clause, and therefore violates the Tenth Amendment.

Constitutional Provisions and Statutes.

United States Constitution, Article 1, Section 8, Clauses 3 & 4.

United States Constitution, Amendment X.

18 United States Code, § 894 (1964 ed., Supp. V, p. 1144).

28 United States Code, § 1254(1) (vol. 7, 1964 ed., p. 5958).

Statement.

Petitioner was charged in a four-count indictment with unlawfully, wilfully and knowingly using extortionate means to attempt to collect extensions of credit, in violation of section 894 of Title 18 of the United States Code (R. 8). A motion to dismiss was filed in the District Court by the petitioner asserting that 18 U.S.C. § 894 is unconstitutional on its face (R. 9). The trial judge denied the motion on March 18, 1970 (R. 9). After a jury trial the petitioner was found guilty on two counts and acquitted on the remaining counts (R. 7). On June 4, 1970, petitioner was sentenced to a term of imprisonment of three years and to pay a fine in the amount of $5,500. Execution of the sentence was stayed pending appeal to the court below (R. 7).

Reasons for Granting the Writ.

The court below upheld petitioner's conviction under 18 U.S.C. § 894, on a finding that this statute was a constitutionally valid extension of congressional power exercised pursuant to the Commerce Clause and the Bankruptcy Clause (App. 13).

This case presents an important and far-reaching issue in that it treats the question of what limitations are to be put upon the Bankruptcy Clause and, more importantly, the Commerce Clause, in relation to the Tenth Amendment to the United States Constitution. Petitioner submits that the Tenth Amendment has been diminished in force and scope by an encroachment upon states' rights through an artificial extension of powers allegedly encompassed within the Commerce and Bankruptcy Clauses (Article 1, sec. 8, cl. 3; art. 1, sec. 8, cl. 4, respectively).

The legitimate use of the commerce power to justify federal jurisdiction in cases of interstate loan-sharking is not disputed. Congressional findings regarding the needs and purposes of 18 U.S.C. § 894 are set forth in Pub. L. No. 90-321, § 201 (3) (May 29, 1968):

> "(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are *purely intrastate* in character, they nevertheless directly affect interstate and foreign commerce." (Emphasis added.)

The findings also reported that collection of debts by extortionate means deprives a debtor of the right to declare bankruptcy. Thus, in order to protect this right Congress enacted § 894 as a means of insuring execution of the bankruptcy laws.

Petitioner contends that if federal participation is needed in combating this area of crime, it cannot be given by usurping states' rights to govern "purely intrastate" activity nor can it be justified on the theory that bankruptcy rights *might* be frustrated.

A. The Commerce Clause does Not Justify § 894.

In *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 534 (1949), the Commerce Clause was described as "one of the most prolific sources of national power." The traditional approach to interpretation of the Commerce Clause is embodied in cases such as the *Shreveport Rate Case,* 234 U.S. 342 (1914). Commerce Clause powers were extended in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964), and *United States* v. *White,* 395 F. 2d 5 (1st Cir. 1968), cert. den. 393 U.S. 928 (1968). Yet, even while expanding this power, interstate activity has always been a major consideration. In *Heart of Atlanta, supra,* it cannot be overlooked that there was a heavy factor of interstate clientele. The statute in question concerned services to *transient guests,* a term which implies mobility even though the motel would be, by nature, stationary. No matter how "local in character" a motel may be, the possibility of interstate activity provides a clear connection to the Commerce Clause. In *White, supra,* the court stated, at page 7:

> "Though the exercise of the commerce power may transcend earlier precedents, the rationale for that exercise in a case of demonstrable necessity has long been established."

Petitioner contends that the modern phenomena of easy mobility does not abrogate the Tenth Amendment nor alleviate the burden of establishing some connection between

the intrastate act and interstate activity. Interstate ramifications, as asserted to in the congressional findings, are not sufficient. The very *nature* of our present society renders insulation against such ramifications virtually impossible. Thus the question arises as to whether or not the contemporary essence of our nation transforms the Commerce Clause into an unlimited enabling statute. Petitioner contends the Tenth Amendment dictates against such a trend. Unless a reasonable balance is achieved between this amendment and the Commerce Clause, by the establishment of a maximum standard to determine a "rational connection," the Tenth Amendment has been neither abrogated or repealed; rather, it has been made impotent by erosion.

In the opinion of the Court below it was stated (App. 11):

> ". . . we are impressed by the fact that every court that has considered this statute has sustained it under the Commerce Clause."

Yet none of the cases relied upon establish or explain the required "rational connection" outside of the asserted congressional findings. See *United States* v. *Curcio,* 310 F. Supp. 351 (D. Conn. 1970). In *United States* v. *Biancofiori,* 422 F. 2d 584, 585 (7th Cir. 1970), cert. den. 398 U.S. 942 (1970), the court stated that the defendant had ignored those cases which hold that Congress can regulate local activities if they in any way substantially affect interstate commerce. The *Biancofiori* court cited *Maryland* v. *Wirtz,* 392 U.S. 188 (1968) and *Katzenbach* v. *McClung,* 379 U.S. 294 (1964). Yet these two cases do not abolish the need for a rational connection. In *Katzenbach, supra,* the court stated, at 302:

> "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 [6. L. Ed. 23] (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago."

Nor did *Wirtz, supra,* abolish the "rational connection" limitation. At page 196, the court stated:

> "This Court has always recognized that the power to regulate commerce, though broad indeed, has limits."

In *United States* v. *Perez,* 426 F. 2d 1073, 1075 (2d Cir. 1970), cert. granted, 39 U.S.L.W. 3214 (U.S. Nov. 16, 1970) (No. 600), the court held:

> ". . . the Commerce Clause is not now niggardly construed and that statutes relying upon that clause frequently apply to intrastate activity."

While petitioner readily recognizes the broad powers of Congress under the Commerce Clause, he maintains that without the *Wirtz, supra, Katzenbach, supra,* and *White, supra,* rational connection, 18 U.S.C. § 894 violates the Tenth Amendment.

B. The Bankruptcy Clause does Not Extend to Congress the Power to Enact 18 U.S.C. § 894.

In the opinion of the court below, it was noted that in *Biancofiori, supra, Curcio, supra,* and *United States* v. *Colegro De Lutro,* 309 F. Supp. 462 (S.D. N.Y. 1970), § 894

was sustained under the Bankruptcy Clause as well as the Commerce Clause (App. 11). It is interesting to note, however, that none of these cases truly justify use of the Bankruptcy Clause. The opinions indicate that the two clauses are deemed synonymous when used to substantiate the constitutionality of § 894. It is only in *Perez, supra,* that the Bankruptcy Clause is treated separate and even then, in the dissenting opinion of Circuit Judge Hayes, at 1081—

> "The statute [the Bankruptcy Clause] is clearly not a uniform law on the subject of bankruptcy. Congress has sought to justify the statute on the ground that, if extortionate means are used to collect an extension of credit, the debtor may be deprived of his right to a discharge in bankruptcy. But this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to me to be capable of such an all-inclusive construction."

Petitioner submits that this use of power through the Bankruptcy Clause is an over-extension of congressional authority and is unconstitutional.

Conclusion.

Petitioner does not contend that the "rational connection" discussed above should become a matter of judicial determination in every indictment under § 894. It is contended, however, that where Congress steps into an area where an act may be "purely intrastate," they have ex-

ceeded their powers and justification cannot be found in the Bankruptcy or Commerce Clauses without a "rational connection."

Further broadening of powers under these clauses causes certain threat to the existence of the Tenth Amendment. Without a standard for limitation of powers, encroachment by the Federal Government into "purely intrastate" activities renders the Tenth Amendment useless.

Petitioner submits that § 894 is violative of the Tenth Amendment for the reasons here and above set forth and this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH S. OTERI,
KEVIN M. KEATING,
CHARLOTTE ANNE PERRETTA,
CRANE, INKER & OTERI,
20 Ashburton Place,
Boston, Massachusetts 02108.

Of Counsel:
MARTIN K. LEPPO,
40 Court Street,
Boston, Massachusetts 02108.

Appendix A.

Relevant Docket Entries.

1969

Dec. 12 Indictment returned.
12 Warrant for arrest issued to US Marshal.
19 Commissioner's papers filed.
Report of proceedings, Order specifying methods and conditions of release, bond ($1000 wos), and docket entries.
19 Arraignment date—Jan 5, 1970 at 2:00 P.M. Notice to Mr. Harrington, and defendant.

1970

Jan. 5 Murray, D.J. Appearance of Martin K. Leppo for deft filed. Deft, with counsel, arraigned; Indictment read; deft pleads not guilty to each count; 20 days for special pleas; trial April 7, 1970 at 10 AM. Present bail continued.
22 Deft's motion to dismiss Indictment filed. c/s
22 Deft's motion for return of seized property and the suppression of evidence pursuant to Rule 41(e) of the FRCP filed. c/s
22 Deft's motion for names of witnesses filed. c/s
22 Deft's motion for list of names and addresses of witnesses who testified before the Grand Jury filed. c/s
22 Deft's motion to inspect exhibits presented to the Grand Jury pursuant to Rule 16(b) and 6(e) of the FRCP filed. c/s
22 Deft's motion for exculpatory evidence filed. c/s
22 Deft's motion to inspect Grand Jury minutes pursuant to Rules 6(e) and 16(b).

22 Deft's motion for discovery and inspection pursuant to Rule 16(a) of the FRCP filed. c/s

Jan. 22 Deft's motion for written materials pursuant to Rule 16(b) of the FRCP filed. c/s

22 Deft's motion for bill of particulars pursuant to Rule 7(f) of the FRCP filed. c/s

Feb. 6 Deft's motion for pre-trial order restraining and enjoining the U.S. Atty from interfering with the Criminal Prosecution of a government witness filed. Affidavit attached.

9 Murray, D.J. On deft's motion for pre-trial order—the within motion is denied for want of a memorandum of authorities for the relief sought. Notice to counsel.

Mar. 18 Murray, J. The following action taken on defendant's motions:

1) On motion to dismiss—motion denied.
2) On motion for names of witnesses—the defendant not showing the need for or materiality of the information, the motion is denied without prejudice.
3) On motion for list of names and addresses of witnesses who testified before the grand jury—The defendant not showing the need for or materiality of the information, the motion is denied without prejudice.
4) On motion to inspect grand jury minutes—The defendant not showing the need for or materiality of the information, the motion is denied without prejudice.
5) On motion to inspect exhibits presented to grand jury—motion allowed compliance by March 26, 1970.
6) On motion for exculpatory evidence—motion allowed; compliance by March 26, 1970.

7) On motion for discovery and inspection—motion allowed; compliance by March 26, 1970.

8) On motion for written materials—motion allowed; compliance by March 26, 1970.

9) On motion for bill of particulars—the government shall file particulars on or before March 26, 1970 which it will voluntarily give. The court reserves action on the motion until such voluntary particulars are filed.

Notice to Messrs Harrington and Leppo of court's action.

Mar. 26 Pltff's motion to enlarge time for filing Government's answer to deft's motion for particulars filed. c/s

27 Government's answer to deft's motion for particulars filed.

31 Deft's motion for continuance from April 7th to the week of May 18, 1970 filed. c/s

Apr. 1 Deft's assent to motion for continuance filed. c/s.

2 Murray, D.J. On motion for continuance—"Motion allowed, and case continued for trial to May 18, 1970 at 12:00 o'clock noon. Notice to counsel."

May 18 Murray, D.J. Case called for trial; deft [redacted] to the bar to be tried; jury empaneled, 12 and 2 alternates, Joseph Ferrari (F), jury sworn; indictment read; criminal jury trial begins; government opening; evidence; adjourned to Tuesday, May 19th at 10 AM.

19 Murray, D.J. Criminal jury trial continues; evidence; govt rests; deft's motion for judgment of acquittal filed; hearing on motion; motion denied; deft's opening; evidence; deft rests; adjourned to Wed. May 20th at 10 AM.

20 Murray, D.J. Criminal jury trial continues; arguments; charge; jury retire to deliberate at 12:35 PM; alternates discharged; jury returns at 2:50 P.M. with verdicts—

May 20 continued:

Count 1—Not Guilty
Count 2—Not Guilty
Count 3—Guilty
Count 4—Guilty

verdicts recorded; jury discharged; disposition June 4th at 10 A.M.—present bail continued.

21 Murray, D.J. Judgment of Acquittal as to Counts 1 & 2 entered.

26 Deft's motion production of pre-sentencing report filed. c/s

26 Deft's motion for judgment of acquittal or motion for new trial filed. c/s

26 Deft's notice of appeal filed.

June 4 Murray, D.J. Deft before the Court with counsel for hearing on pending motions and disposition; motion for production of pre-sentencing report—complied with; motion for judgment of acquittal or new trial—waived; deft sentenced to a term of imprisonment of three years and to pay a fine in the amt of $5,500. Sentence revoked by the court, deft given opportunity to speak on his own behalf before sentence is imposed; deft sentenced to a term of imprisonment of three years and to pay a fine in the amount of $5,500.00; execution of said sentence stayed pending appeal; present bail continued.

4 Murray, D.J. Judgment and Commitment entered. Cpy to US Atty, Probation Messrs Harrington, Leppo.

5 Deft's notice of appeal filed. Copy to Ted Harrington, Spec. Atty.

June 12 Statement of docket entries and original pleadings delivered to the court of appeals.

Indictment.

[Returned December 12, 1969.]

The grand jury charges:

Count One

That on or about October 27, 1969, at North Reading, in the District of Massachusetts, Samuel Fiore, the defendant herein, of North Reading, in said District, did unlawfully, wilfully and knowingly use extortionate means with in the meaning of Section 891(7), Title 18, United States Code, that is to say, said defendant Samuel Fiore did unlawfully, wilfully and knowingly, expressly and implicitly, threaten the use of violence to cause harm to the person of Hubert J. Sweeney, the debtor, to collect and attempt to collect from said Sweeney extensions of credit; in violation of Section 894, Title 18, United States Code.

The grand jury further charges:

Count Two

That on or about November 7, 1969, at North Reading, in the District of Massachusetts, Samuel Fiore, the defendant herein, of North Reading, in said District, did unlawfully, wilfully and knowingly use extortionate means within the meaning of Section 891(7), Title 18, United States Code, that is to say, said defendant Samuel Fiore did unlawfully, wilfully and knowingly, expressly and implicitly, threaten the use of violence to cause harm to the person of of Hubert J. Sweeney, the debtor, to collect and attempt to collect from said Sweeney extensions of credit; in violation of Section 894, Title 18, United States Code.

The grand jury further charges:

Count Three

That on or about November 22, 1969, at North Reading, in the District of Massachusetts, Samuel Fiore, the defendant herein, of North Reading, in said District, did unlawfully, wilfully and knowingly use extortionate means within the meaning of Section 891(7), Title 18, United States Code, that is to say, said defendant Samuel Fiore did unlawfully, wilfully and knowingly, expressly and implicitly, threaten the use of violence to cause harm to the person of Hubert J. Sweeney, the debtor, to collect and attempt to collect from said Sweeney extensions of credit; in violation of Section 894, Title 18, United States Code.

The grand jury further charges:

Count Four

That on or about November 29, 1969, at North Reading, in the District of Massachusetts, Samuel Fiore, the defendant herein, of North Reading, in said District, did unlawfully, wilfully and knowingly use extortionate means within the meaning of Section 891(7), Title 18, United States Code, that is to say, said defendant Samuel Fiore did unlawfully, wilfully and knowingly, expressly and implicitly, threaten the use of violence to cause harm to the person of Hubert J. Sweeney, the debtor, to collect and attempt to collect from said Sweeney extensions of credit; in violation of Section 894, Title 18, United States Code.

A TRUE BILL,
[Illegible]
Foreman of the Grand Jury.

EDWARD F. HARRINGTON
Special Attorney
Department of Justice

DISTRICT OF MASSACHUSETTS,

December 12, 1969

Returned into the District Court by the Grand Jurors and filed 12:58 P.M.

WILLIAM J. LYON
Deputy Clerk.

Motion to Dismiss Indictment.

[Filed January 22, 1970.]

Now comes the Defendant in the above entitled case and respectfully moves that this Honorable Court dismiss the indictment as against him for the following reasons:

1. The Statutes, Title 18 U.S.C. 891 (7) and Title 18 U.S.C. 894, are unconstitutional on their face and as applied to your defendant.
2. The indictment fails to allege facts which constitute criminal offenses against the United States of America.
3. The indictment fails to allege facts which constitute criminal offenses over which this Court has jurisdiction.

Defendant requests that a hearing date be set for the presentation of evidence and arguments in support of this motion.

By his Attorney

MARTIN K. LEPPO

March 18, 1970
Motion denied.

GRANT J. MURRAY,
Dist. Judge.
U.S. District Court, District of Mass.

Appendix B.

United States Court of Appeals for the First Circuit.

No. 7646.

UNITED STATES OF AMERICA,
APPELLEE,
v.
SAMUEL FIORE,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Kevin M. Keating, with whom *Joseph S. Oteri*, *Crane, Inker & Oteri*, and *Martin K. Leppo*, were on brief, for appellant.

Gerald McDowell, Special Attorney, Department of Justice, with whom *Will Wilson*, Assistant Attorney General, Criminal Division, and *Walter T. Barnes*, Special Attorney, Department of Justice, were on brief, for appellee.

December 4, 1970.

McENTEE, *Circuit Judge.* Defendant was convicted on two counts of an indictment charging him with violations of the federal anti-loansharking law. Each count charged that on a specific occasion in November 1969 in North Reading, Massachusetts, the defendant expressly and implicitly threatened the use of violence to cause harm to the person of one Hubert J. Sweeney, the debtor, to collect and attempt to collect extensions of credit from said Sweeney in violation of 18 U.S.C. § 894 (Supp. V, 1970).[1]

The relevant facts are as follows. In 1963 or early 1964 Sweeney, an insurance broker, after attempting unsuccessfully to borrow money elsewhere, obtained a loan of $3,000 from the defendant. No writings of any kind were signed but the defendant told him that the interest would be 2% a week (104% a year). This required payments of $60 a week in interest alone which Sweeney made every month or so for some two and a half years. In 1967 the defendant told Sweeney that he still owed $1,000 on this loan. In the latter part of that year Sweeney borrowed $2,000 more from the defendant. As in the first instance no papers were signed but this time the interest was raised to 3% a week or 156% a year. Sweeney kept up the interest payments on these loans until the latter part of September 1969 and

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[1] Section 894, which is part of the Consumer Credit Protection Act of 1968, 82 Stat. 146 (1968), provides in pertinent part:

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both."

"An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. § 891(7).

stopped. Shortly thereafter the defendant began hounding him for payment. Sweeney testified that on November 22 the defendant telephoned him at home, cursed him for not paying, said "the big boss" was there and wanted all the money or else. He also testified that on November 29 defendant telephoned him again and, among other things, threatened that if he didn't pay he was liable "to get a bomb" in his car. Sweeney's wife, who listened in on both conversations, corroborated her husband's testimony with reference to these threats. Sweeney testified that because of the threats he was "very, very much afraid."

In addition to the foregoing, the following significant testimony was adduced at trial. In October 1969 Sweeney misappropriated an insurance client's check for $500, cashed it at defendant's restaurant and gave the defendant $300 out of the proceeds towards payment of interest on the loans. Sweeney's boss testified that he fired him when he learned of this misappropriation. He also testified to two conversations he had with the defendant which have an important bearing on the issues involved in this case.[2]

The defendant admitted loaning money to Sweeney knowing that he had no credit but disputed the amounts of the loans and denied making the threats. He also denied that he was in the loan business or that he was a loan shark.

On appeal, defendant's major contention is that Congress had no power or authority to enact the statute in question. In passing this legislation, however, Congress relied on its constitutional power "to regulate commerce . . . among the

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[2] He stated that the defendant told him, "They are after him [Sweeney] to pay and I told him I was not going to pay until Sweeney's broken up or in a box." The witness also testified that he chided the defendant for lending Sweeney so much money when the latter was in financial trouble. He then said to the defendant, "This sounds like the Mafia," to which the latter replied, "Something like that."

several states'' and '' to establish . . . uniform laws on the subject of bankruptcies. . . .''[3] The act contains pertinent congressional findings regarding the relationship between organized crime and extortionate credit transactions and their effect on interstate commerce and the federal bankruptcy laws. It also contains a forceful declaration of congressional purpose to remedy the evils mentioned in these findings through the exercise of its aforesaid powers.[4] These findings were based on evidence before Congress. Clearly they have a rational basis and therefore are not open to question here. *United States* v. *Gainey,* 380 U.S. 63 (1965).

The defendant contends that the statute may not be sustained under either of said clauses of the Constitution. Although we recently stated in *United States* v. *Tomasetta,* 429 F. 2d 978 (1st Cir. 1970), that the constitutionality of this statute was ''a subject of serious controversy,'' we are impressed by the fact that every court that has considered this statute has sustained it under the Commerce Clause. *See United States* v. *Perez,* 426 F. 2d 1073 (2d Cir. 1970), *cert. granted,* 39 U.S.L.W. 3214 (U.S. Nov. 16, 1970) (No. 600); *United States* v. *Biancofiori,* 422 F. 2d 584 (7th Cir.), *cert. denied,* 398 U.S. 942 (1970); *United States* v. *Curcio,* 310 F. Supp. 351 (D. Conn. 1970), and *United States* v. *Calegro de Lutro,* 309 F. Supp. 462 (S.D. N.Y. 1970). We are further impressed by the fact that, although the court in *Perez* did not reach the question, the court in each of the other three cases also sustained § 894 under the Bankruptcy Clause. Most of the contentions made in the instant case were considered and rejected in these four cases and we need consider them only briefly here.

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[3] U.S. Const. Art. I § 8, cl. 3, 4.

[4] Consumer Credit Protection Act, Title II, § 201, 18 U.S.C. § 891 (Supp. V, 1970).

In *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 258 (1964), the Court stated "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof . . . which might have a substantial and harmful effect upon that commerce." In attacking the power of Congress to enact § 984 under the Commerce Clause, defendant contends that in prosecutions under this statute the Constitution requires a determination, on a case to case basis, that interstate commerce is involved and that this determination must be made in a judicial proceeding. Suffice it to say that in upholding the validity of the Drug Abuse Control Amendments of 1965 this court, as well as other circuit courts, have held that such a showing is not constitutionally required. *United States* v. *White,* 395 F. 2d 5 (1st Cir.), *cert. denied,* 393 U.S. 928 (1968); *accord, United States* v. *Cerrito,* 413 F. 2d 1270 (7th Cir. 1969), *cert. denied,* 396 U.S. 1004 (1970); *White* v. *United States,* 399 F. 2d 813 (8th Cir. 1968); *Deyo* v. *United States,* 396 F. 2d 595 (9th Cir. 1968).[5]

Also, defendant relies heavily on *United States* v. *Five Gambling Devices,* 346 U.S. 441 (1953), especially on the dictum of Mr. Justice Jackson that "No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information not shown to be

[5] Dictum in *United States* v. *Minor,* 396 U.S. 87, 98 n. 13 (1969), lends additional support. *Accord, Perez, supra* at 1077 n. 2. In considering 26 U.S.C. § 4705(a) (1964), a revenue statute, the court said, "Even viewing sec. 4705(a) as little more than a flat ban on certain sales, it is sustainable under the powers granted Congress in Art. I, sec. 8. *See Yee Hem* v. *United States,* 268 U.S. 178, 183 (1925); *Brolan* v. *United States,* 236 U.S. 216, 222 (1915); *cf. United States* v. *Sullivan,* 332 U.S. 689 (1948); *United States* v. *Darby,* 312 U.S. 100 (1941)." The dissent disagrees with the use of the Commerce Clause to sustain a taxing measure, *Minor* at 101. *Cf. Burnet* v. *Brooks,* 288 U.S. 378, 389 (1933). But it did not attack the conclusion that the Commerce Clause could have been used had the statute been passed under it.

in, or mingled with, or found to affect commerce." *Id.* at 446. But as we noted in *United States* v. *White, supra,*

> "there seems little doubt that *Heart of Atlanta* goes beyond the dictum in *Gambling Devices* in its willingness in a proper case to approve legislation declaring that certain activities affect interstate commerce per se without requiring proof in each case." 395 F. 2d 5, 8 n. 3.

Accord, Perez, supra at 1078.[6] Thus we conclude that § 894 is sustainable as a valid exercise of congressional power under the Commerce Clause.

This statute may also be sustained as a "necessary and proper" extension of the congressional power to make uniform laws concerning bankruptcies. *United States* v. *Biancofiori, supra.* In enacting the statute Congress expressly found that "Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies."[7] Congress also stated,

> "Article I, section 8, of the Constitution expressly empowers Congress to make 'uniform laws on the subject of bankruptcies.' In the exercise of this power, Congress has enacted the Bankruptcy Act, which confers on any debtor the statutory right, with certain qualifications, to be discharged of his debts by applying substantially all of his property toward their repay-

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[6] In *Perez,* the Second Circuit agreed with our opinion in *White.* It rejected the *Gambling Devices* argument on the grounds that both the opinion by Mr. Justice Jackson and the dissent by Mr. Justice Clark can only be read to say that the question is a substantial one. *See also Calegro de Lutro, supra* at 464.

[7] Consumer Credit Protection Act, Title II, § 201(a)(4), 18 U.S.C. § 891 (Supp. V, 1970).

> ment. It is obvious, however, that obligations as to which there is an understanding that they may be collected by extortionate means, or which are actually so collected, are not susceptible of being 'discharged' in bankruptcy in any meaningful sense. Such transactions thus deprive the debtor of a Federal statutory right, and at the same time defeat one of the principal purposes of the Bankruptcy Act, which is to afford insolvent persons the opportunity to make a fresh start. Thus, it seems clearly within the power of the Congress to protect the Federal statutory right, and to assure that the bankruptcy laws will be carried into execution, by enacting legislation to prohibit extortionate credit transfers.'' [8]

These findings also have a rational basis and are not open to question here.

The instant case is a typical example of the direct connection between loansharking and bankruptcy. As here, loansharks lend money to persons who are usually in financial trouble but are unable to borrow from other sources. These victims are the ones most likely to use the bankruptcy laws. The loanshark uses extortionate means to make sure that the interest on the loans is collected first. In a situation of this kind the debtor cannot freely exercise his rights under the Bankruptcy Act without running the risk, as in the instant case, of sustaining bodily harm. As was so aptly pointed out in the government's brief, loansharking works a substantial inhibiting effect on the exercise of federal rights under the bankruptcy laws.

In our view Congress could reasonably assume that the very finding of threats of violence means that the debtor is near enough to insolvency to need his bankruptcy rights protected. But proof of the debtor's financial condition

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[8] 1968 U.S. Code Cong. Admin. News, pp. 2025-26.

must be generally predicated on his willingness to testify to it. In threat cases, testimony is likely to be unavailable. The congressional purpose throughout the statute is to lessen the necessity of the prosecution's relying on the victim's testimony.[9] In a rare instance a solvent debtor might refuse to pay out of sheer obstinacy or in reliance on a state usury law. Yet the likelihood of the debtor being solvent is remote, whereas proof of his solvency may be extremely difficult. We cannot say, therefore, that Congress' assumption was not reasonably adapted to the task of protecting bankruptcy rights and thus we also sustain the statute under the Bankruptcy Clause.

Defendant attacks the constitutionalty of subsections (b) and (c) of § 894,[10] claiming that these subsections violate his freedom to contract and his right to confront witnesses against him. Defendant has no standing to attack his conviction on said grounds because the record shows that these subsections were not applied to him. *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring); *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.* 226 U.S. 217, 219-220 (1912); *Reddy* v. *United States,* 403 F. 2d 26 (1st Cir. 1968), *cert. denied,* 393 U.S.

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[9] Congress felt that if debtors are "in genuine fear of the consequences of nonpayment, they are apt to be equally or even more in fear of the consequences of testifying as a complaining witness." 1968 U.S. Code Cong. & Admin. News, p. 2026. For these reasons, Congress provided special evidentiary rules under § 894 (b) and (c).

[10] Section 894(b) provides that evidence of the debtor's knowledge that "one or more extensions of credit by the creditor were collected or attempted to be collected by extortionate means may be introduced" to prove an implicit threat. Section 894(c) provides for admission into evidence of the defendant's reputation in the community.

1085 (1969). His further contentions that the indictment is too vague when measured by *Tomasetta* Standards[11] is utterly lacking in merit and is summarily rejected.

Defendant also urges that the term "implicitly threaten" as used in the statute violates his right to free speech and is too vague. He concedes that to forbid express threats in situations such as the instant case is not unconstitutional. As he was indicted and convicted for "expressly *and* implicitly" threatening Sweeney, the jury must have found that there was an express threat as well as an implicit one. Since under the statute the jury could convict by finding an express threat, which it did, defendant has no standing to question the constitutionality of the implicit threat aspect of the statute. *Raines, supra; Ashwander, supra; Yazoo & Mississippi Valley R. Co., supra; Reddy, supra.* All other points raised have also been considered and found to be without merit.

Affirmed.

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[11] *See United States* v. *Tomasetta, supra.*

Appendix C.

United States Constitution, Article 1, Section 8, Clauses 3 & 4.

Article 1, section 8 of the Constitution of the United States provides in relevant part:

> "The Congress shall have power . . .
>
> . . . . . .
>
> "To regulate commerce with foreign Nations, and among the several states . . .
>
> . . . . . .
>
> "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . ."

United States Constitution, Amendment X.

The Tenth Amendment of the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

18 U.S.C. § 894 (1964 ed., Suppl. V, p. 1144).

> "(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> "(1) to collect or attempt to collect any extension of credit, or
>
> "(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years or both.

"(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

"(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection."

28 U.S.C. § 1254(1) (vol. 7, 1964 ed., p. 5958).

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."